



What is the nature and extent of claimant's injury and/or disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds, based upon the evidence, that the Award of the Assistant Director granting claimant a 15.33 percent functional disability to the right upper extremity should be affirmed.

Claimant alleges injuries to both right and left upper extremities arising out of and in the course of her employment with respondent. Respondent does not deny that claimant suffered accidental injury to the right upper extremity on the dates alleged. The significant dispute in this matter arises around claimant's allegations of injury to her left upper extremity, neck, and shoulders which respondent contends resulted from non-work-related circumstances.

The Assistant Director found that it was undisputed that claimant was not working for respondent at the time of the onset of symptoms in her left upper extremity. This is not clear from the record. In claimant's submission letter provided to the Administrative Law Judge, claimant argues simultaneous aggravation of her wrists in December 1990. The July 2, 1996, medical report of Lanny W. Harris, M.D., which was stipulated into evidence, showed a history of simultaneous persistent pain in claimant's bilateral wrists with repetitive movement. The evidence becomes more confusing when considering claimant argued in her brief to the Appeals Board that claimant did not begin noticing problems in her left hand until August 1991. The April 14, 1993, medical report of William O. Reed, Jr., M.D., shows claimant having symptomatology in her right upper extremity only. The December 29, 1993, report of Bernard M. Abrams, M.D., indicates right upper extremity symptomatology with more recent complaints of pain in the neck, left shoulder, and left wrist region due to claimant's favoring her right arm. The Assistant Director found that the evidence in the record was insufficient to conclude whether claimant's left upper extremity symptomatology was a natural consequence of the previous injury to the right upper extremity or a separate non-compensable injury. The Appeals Board agrees with that assessment and further finds the evidence in the record unclear as to a third possibility that claimant may have suffered simultaneous aggravation to her upper extremities in 1990.

The medical evidence further contradicts claimant's assertion that she suffered simultaneous bilateral injuries. Lynn D. Ketchum, M.D., who performed surgery on claimant's right upper extremity and left upper extremity found that claimant had suffered no permanency to the left upper extremity as a result of her ongoing symptomatology. Dr. Ketchum did assess a 3 percent functional impairment to claimant's left shoulder but found that she suffered from overuse on the left side with claimant's housework contributing to the overuse.

In workers compensation litigation, the burden of proof is upon claimant to establish her right to an award for compensation by proving the various conditions upon which her right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g), as amended. The Appeals Board acknowledges that while it is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant in assessing the question of disability, those decisions by the Appeals Board must be based upon credible evidence. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Confusion is created in the record by claimant's conflicting testimony and the conflicting medical evidence. The Appeals Board finds that claimant has failed to prove by a preponderance of the credible evidence the cause of her ongoing left upper extremity symptomatology. Several possibilities exist in the record with claimant failing to prove by a preponderance of the credible evidence which version is the more credible. Therefore, the Appeals Board finds claimant has failed in her burden of proving that the left upper extremity symptomatology resulted from an accidental injury arising out of and in the course of her employment with respondent and benefits for the left upper extremity should be denied.

With regard to the 15.33 percent functional impairment assessed to claimant's right upper extremity by the Assistant Director, the Appeals Board finds the medical evidence of John B. Moore, IV, M.D., Lynn D. Ketchum, M.D., and Lanny W. Harris, M.D., were appropriately considered and given equal weight. This Award is supported by the evidence and is affirmed by the Appeals Board.

In all other regards, the Award of the Assistant Director should be affirmed insofar as it is not in contradiction to the findings expressed herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated March 25, 1997, should be, and is hereby, affirmed.

Claimant is entitled to 59.57 weeks temporary total disability compensation at the rate of \$205.67 per week totaling \$12,251.76 followed by 20 weeks temporary partial disability compensation (converted to 17.83 weeks temporary total disability for computation purposes) in the sum of \$3,667.44 followed by 20.33 weeks permanent partial disability at the rate of \$205.67 per week in the amount of \$4,181.27 for a 15.33% loss of the right upper extremity for a total award of \$20,100.47 (mathematical correction) which is ordered paid in one lump sum minus any amounts previously paid. In all other regards the Award of the Assistant Director should be, and is hereby, affirmed insofar as it is not in contravention of the findings expressed herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1997.

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully dissent with the majority. Although the majority is admittedly confused by the evidence, I am not.

The evidence is clear that claimant developed injury to her left arm after leaving respondent's employment in July 1991. The evidence also establishes it is more probably true than not that the left arm injury was the natural consequence of the right arm injury due to overuse.

Claimant had right carpal tunnel release surgery in January 1991. The medical notes compiled during the period claimant initially received treatment for the right carpal tunnel syndrome are silent regarding complaints in the left upper extremity. To me, that silence in the medical records indicates claimant was having little, if any, left hand complaints at that time.

The first notation of left upper extremity complaints appears in 1993. In 1994, claimant began treating with Dr. Ketchum who re-operated claimant's right wrist in November 1994, operated on claimant's left wrist in January 1995, and again re-operated the right wrist in July 1995. From that evidence, coupled with claimant's testimony, it is reasonable to conclude that claimant experienced increased symptoms in both upper extremities immediately before Dr. Ketchum operated. That explains Dr. Harris' statements of simultaneous symptomatology in the general history he provided.

When considering the entire record, claimant has established she is entitled to permanent partial disability benefits pursuant to K.S.A. 44-510e.

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**BOARD MEMBER**

c: Kevin J. Kruse, Overland Park, KS  
Kenneth J. Hursh, Overland Park, KS  
Brad E. Avery, Assistant Director  
Philip S. Harness, Director